Supreme Court, U.S.
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

LEX DALE OWENS,
Petitioner

v.

STATE OF TEXAS,
Respondent

Petition for Writ of Certiorari to the Court of Appeals for the Third Supreme Judicial District of Texas at Austin

PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTION PRESENTED

Does the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668, 687 (1984), require that an objection regarding the use of Petitioner's exercise of his Fourth Amendment right to refuse a police search of his luggage be "basic, fundamental, and well-established" before counsel's complete failure to raise the objection will constitute "deficient" performance by counsel?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Comes Now the Petitioner, LEX DALE OWENS, who requests that the Court grant his petition for writ of certiorari and review the decision of the Court of Appeals for the Third Supreme Judicial District of Texas at Austin, and would show the Court as follows:

OPINION BELOW

The Court of Appeals for the Third Supreme Judicial District of Texas at Austin affirmed the denial of relief to the Petitioner in a published opinion. *Ex parte Lex Dale Owens,* 860 S.W.2d 727 (Tex. App.--Austin 1993). This opinion is attached to this petition as Appendix A.

STATEMENT OF JURISDICTION

On August 25, 1993, the Court of Appeals for the Third Supreme Judicial District of Texas at Austin affirmed the denial of habeas corpus relief by the trial court. *Ex parte Owens,* 860 S.W.2d 727 (Tex. App.--Austin 1993). Petitioner then timely sought review from the Court of Criminal Appeals of Texas by filing a petition for discretionary review with that court, which was denied without opinion on October 20, 1993. That order from the Court of Criminal Appeals is attached as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. XIV:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner was indicted in the 299th Judicial District Court of Travis County, Texas, for felony possession of a controlled substance, to wit: 3,4-methylene-dioxy-methamphetamine (more commonly known as "ecstasy"). On October 30-31, 1990, Petitioner was tried before a jury upon his plea of not guilty. He was represented at this trial by Mr. Thomas Autry, Esq., an attorney from Austin, Texas. The only contested issue was whether Petitioner actually knew the "ecstasy" tablets were in a Tylenol bottle in his luggage. The jury returned a verdict of guilty, and the Petitioner was sentenced by the trial court to six years probation and a fine of $3,000.00 on December 21, 1990. (TR.-59-62.) ("TR." refers to the collection of the legal papers from trial, the legal papers from the application for writ of habeas corpus and the transcribed testimony from trial; "S.F." refers to the transcribed testimony from the habeas corpus evidentiary hearing.)

The evidence from trial showed that at the Austin Municipal Airport Petitioner and a companion, Martin Luecke, had been approached by City of Austin, Texas, police officers Gauldin and Wolsch after a drug detection dog had given a positive alert to a grey suitcase with Petitioner's name on it. The police then detained the Petitioner and all of his luggage and obtained a search warrant. In the grey suitcase, the officers found a small quantity of marijuana. The officers then found a Tylenol bottle in Petitioner's carry-on bag, from which Petitioner offered Wolsch a Tylenol for a headache the officer had complained about. Wolsch noticed

that the tablets did not appear to be Tylenol and had them analyzed. After subsequent testing, the chemist discovered that the tablets were "ecstasy."

During the short, two-day trial, Petitioner's counsel, without objection, allowed the State on seven different occasions to elicit evidence of Petitioner's refusal to consent to a search of his luggage when first approached by the police officers at the airport, (TR.-116-17, 124-25, 152, 168-69, 173, 265, 266.) He had also permitted the State to preview this evidence in opening statement. (TR.- 105.) In addition, Petitioner's counsel himself even brought up the refusal to consent in questioning four different times. (TR.-152, 190, 193, 230.) However, it was in final argument that the refusal to consent to the search was repeatedly highlighted to detrimental effect by the State. (TR.-293-94, 315, 317.)

The cornerstone of Petitioner's defense that he lacked knowledge of the presence of "ecstasy" in the Tylenol bottle, which was vigorously argued to the jury by Autry, was that it was patently unreasonable to believe that Petitioner would have called the attention of the police to the "ecstasy" tablets by offering Wolsch a Tylenol for his headache if Petitioner actually knew that the Tylenol bottle contained contraband. (TR.-307-310.) However, trial counsel's failure to object to and keep out the evidence and argument concerning Petitioner's refusal to consent to a search of his luggage provided the State with the basis for an effective rebuttal. The State argued, without objection, in both sections of its argument that the Petitioner's refusal to consent to a police search of his luggage showed that he had guilty knowledge. (TR.-293-94, 315, 317.) The adverse impact of this evidence is also demonstrated by the jury's request during deliberations to have Gauldin's testimony regarding the initial encounter with Petitioner, which included Petitioner's refusal to consent to a search of his luggage, read back shortly before returning with a guilty verdict. (TR.-320-23.)

After unsuccessfully attempting to appeal his conviction, on March 18, 1992, Petitioner filed an application for a post-conviction writ of habeas corpus in the convicting court pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.05. In his application, Petitioner alleged that his trial counsel, Autry, had been constitutionally ineffective at trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution for failing to object to repeated references and argument concerning Petitioner's refusal to consent to a search of his luggage by the police. (TR.-65-67.)

The trial court conducted an evidentiary hearing on Petitioner's writ application. At the hearing, Autry testified that he was aware at the time of Petitioner's trial that the refusal to consent to a search was evidence which the prosecution wanted to use in its case. (S.F.-11.) Autry admitted that he did not think he was aware that refusal to consent to a search was legally inadmissible, and he was not familiar with *Powell v. State,* 660 S.W.2d 842 (Tex. App.--El Paso 1983) in which a Texas Court of Appeals had held that the use of such evidence of refusal to consent was improper. (S.F.-11.) However, he agreed that the admission of the evidence of the refusal by Petitioner to consent to a search was improper. (S.F.-11-12.) Autry further acknowledged that his failure to object to this evidence and argument on the refusal to consent was not a tactical decision on his part. (S.F.-12-13.) The district court denied Petitioner's request for a new trial based upon his claim of ineffective assistance of counsel. (TR.87-88.)

Petitioner filed a timely notice of appeal and appealed the denial of habeas corpus relief to the Court of Appeals for the Third Supreme Judicial District of Texas at Austin. (TR.-83.) In its published opinion, *Ex parte Owens,* 860 S.W.2d 727 (Tex. App.--Austin 1993), the Court of Appeals considered Petitioner's only point of error in which he argued that he had been denied the effective assistance of counsel under the United States Constitution by his trial attorney's failure to object to the evidence and argument concerning his refusal to consent to the search of his luggage. *Id.*, at 728. The Court

of Appeals affirmed after concluding "that appellant did not meet his burden with respect to the first prong of the *Strickland* test." *Id.*, at 731.

REASONS FOR GRANTING THE WRIT

The court below held that the impropriety of evidence and argument concerning a defendant's rightful refusal to consent to a search of his luggage by police was not a well-established legal rule. *Owens,* 860 S.W.2d at 731. Then, engrafting a new requirement onto the analysis of ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984), the court decided that, because the rule was not "well-established," the total failure of Petitioner's trial counsel to object to this improper evidence did not "constitute deficient performance under the first prong of the *Strickland* test." *Owens,* 860 S.W.2d at 731. The addition of this new requirement to the deficient performance inquiry under *Strickland* conflicts with the applicable decisions of this Court and imposes a lower standard for acceptable and effective representation than permitted by the Constitution. Further, this Court should also take the opportunity presented by this case to decide an important federal issue and make unmistakably clear that the lawful refusal of a defendant to consent to a search may not be used in any way as evidence of guilt. SUP. CT. R. Rule 10.1(c).

In *Strickland v. Washington,* 466 U.S. 668 (1984), this Court set out the proper standards for reviewing a defendant's claim that he received the ineffective assistance of counsel under the Sixth Amendent. The first component, which was the one considered dispositive by the court below in this case, is whether the defendant has shown that his attorney's performance was "deficient." *Id.*, at 687. To accomplish this, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

There is nothing in this Court's analysis in *Strickland* or in subsequent cases which would require a defendant to show, as the Court of Appeals below demanded, that his attorney's errors were contrary to "a basic, fundamental, and well-established rule" under state or federal law. All that should be necessary is that it be proven that the trial attorney's actions were not professionally reasonable. The Court of Appeals reasoning approves an "uneducated attorney standard" whereby an attorney is n t responsible for raising any objections or defenses which are not considered black-letter law. This new standard deprives defendants of the level of competent and effective representation which is required under the Sixth Amendment and *Strickland* because it will often be objectively reasonable for counsel to raise an issue which has not yet been established as a hornbook rule, but for which there is otherwise ample legal support.

In Petitioner's case, the inadmissibility of evidence of his invocation of his right not to consent to the search of his luggage was supported by substantial precedent and had been established in Texas several years prior to his trial in a published opinion by the Texas Court of Appeals in *Powell v. State,* 660 S.W.2d 842 (Tex. App.--El Paso 1983). There the court had stated:

> In Ground of Error No. Three, Appellant complains that Officer Anastacio was improperly permitted to testify over objection that Appellant would not permit the officers to inspect the package voluntarily. Whether this is viewed as testimony concerning her verbal responses while in custody or her physical action, it was improper. The invocation of constitutional rights such as assistance of counsel, silence, or freedom from unreasonable searches may not be relied upon as evidence of guilt. To permit the use of such evidence for purposes of incrimination would erode the protections guaranteed by both state and

federal constitutions.

Powell, 660 S.W.2d at 845.

While it may be true that the Court of Criminal Appeals of Texas, the highest court for criminal cases in Texas, has not considered the admissibility of evidence and argument about refusal to consent to a search, there is no Texas case which contains a holding arguably contrary to *Powell* or which even questions it. Further, at the time of Petitioner's trial in 1990, there were a number of cases from other federal and state jurisdictions which adopt the same rule as *Powell* and which were available to the Petitioner's counsel: *United States v. Prescott,* 581 F.2d 45 (9th Cir. 1978); *United States v. Taxe,* 540 F.2d 961, 969 (9th Cir. 1976); *Anable v. Ford,* 653 F.Supp. 22, 36 (W.D. Ark. 1985); *Garcia v. State,* 103 N.M. 713, 712 P.2d 1375 (1986); *People v. Stephens,* 133 Mich. App. 294, 349 N.W.2d 162 (1984); *Padgett v. State,* 590 P.2d 432 (Alaska 1979); *Bargas v. State,* 489 P.2d 130 (Alaska 1971). Had counsel for Petitioner researched the issue before trial, it does not appear that he would have been able to find any modern decision in any jurisdiction which approved the use of a defendant's refusal to consent to a search as evidence of his guilt.

Since Petitioner's trial, every court which has considered the matter has agreed that a defendant's rightful refusal to consent to a search is no evidence of guilt. *United States v. Thame,* 846 F.2d 200, 206-207 (3d Cir. 1988); *State v. Jennings,* 333 N.C. 579, 430 S.E.2d 188, 200 (1993); *Commonwealth v. Tillery,* 611 A.2d 1245, 1249-50 (Pa. Super. 1992); *Commonwealth v. Welch,* 585 A.2d 517 (Pa. Super. 1991); *Gomez v. State,* 572 So.2d 952 (Fla. Dist. Ct. App. 1990). Also, in the time since Petitioner's trial, it still does not appear that any court has ever approved the use as evidence of refusal to consent to a search.

Although Petitioner's counsel was unaware of the cases on refusal to consent to a search which were available

at the time of trial, he was aware that invocation of the rights to silence and counsel was inadmissible evidence. (S.F.-10.) This was an acknowledgement of the "well-established" rule from *Griffin v. California,* 380 U.S. 609 (1965), and other cases that the Fifth Amendment right not to testify may not be used as evidence of guilt because it improperly penalizes the exercise of a constitutional right. *Simmons v. United States,* 390 U.S. 377 (1968), applies a similar principle in the Fourth Amendment context. In *Simmons* this Court barred the use of a defendant's testimony from a suppression hearing to prove his guilt at trial because it unfairly required the defendant to give up one constitutional right to exercise another one. *Simmons,* 390 U.S. at 393-94. From these cases comes a "basic, fundamental, and well-established" principle that it is improper to place significant penalties on the rightful exercise of a constitutional right, a rule which Petitioner's counsel had no excuse for ignoring. It does not require creation of a new, cutting-edge legal theory in order to use these cases as a basis for objecting to the introduction of the Petitioner's refusal to consent against him.

The failure of Petitioner's counsel in this case to object to the evidence and argument about his lawful refusal to consent to a police search of his luggage is legally no different than the failure of the attorney in *Kimmelman v. Morrison,* 477 U.S. 365 (1986), to move for suppression of incriminating physical evidence, which failure this Court found to be constitutionally deficient. *Kimmelman,* 477 U.S. at 383-87. In *Kimmelman* the defendant's attorney had not conducted any pretrial discovery so as to discover the existence of a questionable seizure of a bedsheet, a piece of evidence which was very damaging to the defendant's case. This resulted in counsel's failure to timely file a motion to suppress. *Id.,* at 368-69, 385-86.

Noting that under *United States v. Cronic,* 466 U.S. 648, 657 n.20 (1984), even a single error may support a claim of ineffective assistance of counsel, this Court agreed with the courts below that the conduct of Morrison's

attorney was unreasonable under existing professional norms. *Kimmelman,* 477 U.S. at 383-84. In reviewing the attorney's actions, the Court stated:

> The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. . . .
>
> Viewing counsel's failure to conduct any discovery from his perspective at the time he decided to forgo that stage of pretrial preparation and applying a "heavy measure of deference, *ibid.* [*Strickland,* 466 U.S. at 691], to his judgment, we find counsel's decision unreasonable, that is, contrary to prevailing professional norms. . . ."[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Ibid.* Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. . . .

Kimmelman, 477 U.S. at 385.

Petitioner's attorney similarly failed to "suppress" the damaging evidence of his refusal to consent to the search of his luggage. Likewise, this failure to object was not a tactical decision on the part of Petitioner's attorney, but rather was the result of his complete failure to investigate the legal basis for barring the use and argument of this evidence, which he knew the State intended to use. (S.F.-10-11.) The fact that the investigation involved the pretrial discovery of legal principles rather than facts does not change the

situation. The action or inaction of Petitioner's lawyer was no more within the wide range of professionally competent assistance than that of Morrison's lawyer.

The failure to raise significant and proper legal issues has repeatedly been held to be "deficient" under *Strickland. See, e.g., Risher v. United States,* 992 F.2d 982 (9th Cir. 1993) (failure to warn defendant he could be sentenced under Sentencing Guidelines); *Prichard v. Lockhart,* 990 F.2d 352 (8th Cir. 1993) (failure to object to improper use of an out-of-state conviction for enhancement of sentence); *Nelson v. Hargett,* 989 F.2d 847 (5th Cir. 1993) (failure to pursue constitutional speedy trial claim); *Featherstone v. Estelle,* 948 F.2d 1497, 1507 (9th Cir. 1991) (failure to object to improper statistical argument by prosecutor); *Thomas v. Harrelson,* 942 F.2d 1530 (11th Cir. 1991) (failure to raise issue of constructive amendment of indictment); *Atkins v. Attorney General,* 932 F.2d 1430 (11th Cir. 1991) (failure to object to fingerprint card which contained notation of defendant's prior arrest); *Capps v. Sullivan,* 921 F.2d 260 (10th Cir. 1990) (failure to request a jury instruction on entrapment defense); *Smith v. Dugger,* 911 F.2d 494 (11th Cir. 1990) (failure to move for suppression of defendant's confessions); *United States v. Loughery,* 908 F.2d 1014 (D.C. Cir. 1990) (failure to inform defendant of invalidation of portion of indictment under *McNally v. United States,* 483 U.S. 350 (1987)); *Rodriguez v. Young,* 906 F.2d 1153, 1160-61 (7th Cir. 1990) (failure to move to suppress identification testimony); *Kubat v. Thierat,* 867 F.2d 351, 369-71 (7th Cir. 1989) (failure to object to erroneous jury instruction which required unanimous verdict not to impose death penalty); *Holsclaw v. Smith,* 822 F.2d 1041 (11th Cir. 1987) (failure to raise question of sufficiency of evidence at trial); *Brown v. Butler,* 811 F.2d 938, 942 (5th Cir. 1987) (failure to advise defendant of valid venue defense).

The decision by the court below requiring the Petitioner to show, not only that his attorney's failure to object to the use of his refusal to consent to a search was professionally unreasonable, but also to show that the

failure involved a "basic, fundamental, and well-established" legal rule is contrary to this Court's prior decisions and the decisions from other courts. This holding should be reviewed by this Court, particularly since it also involves important federal issues as to the use of a lawful refusal to consent to a search as evidence of guilt.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to the Court of Appeals for the Third Supreme Judicial District of Texas at Austin to review its decision.

Respectfully submitted,

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APPENDIX A

IN THE
COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN

NO. 3-92-491-CR

EX PARTE: LEX DALE OWENS,
APPELLANT

FROM THE
DISTRICT COURT OF TRAVIS COUNTY,
299TH JUDICIAL DISTRICT

NO. 100,707,
HONORABLE JON H. WISSER,
JUDGE PRESIDING

Appellant, Lex Dale Owens, appeals from a district-court order, rendered following a hearing on his post-conviction application for writ of habeas corpus, denying his request for a new trial based on claims of ineffective assistance of counsel. We will affirm the district court's order.

FACTUAL AND PROCEDURAL BACKGROUND

On October 20, 1989, Austin police officers James Wolsch and Richard Gauldin were at the Robert Mueller Airport in Austin, screening luggage with a narcotics-

detection dog. The dog "alerted" on a suitcase with a name tag reflecting "Lex Owens." Officer Gauldin initialed the claim check, and the bag was forwarded to the baggage-claim area. After appellant retrieved the suitcase in the baggage-claim area, both officers spoke with him and requested permission to search the suitcase. Appellant refused. Thereafter, Officer Wolsch informed appellant that he intended to obtain a search warrant for the suitcase. Appellant was instructed to accompany the officers to an office at the airport while a warrant was obtained.

After the search warrant was obtained, officers searched appellant's suitcase and discovered marihuana. Appellant was placed under arrest. Incident to appellant's arrest, the officers searched his carry-on bag and discovered tablets, later identified as "ecstasy," a form of methamphetamine. Appellant was later indicted for possession of this controlled substance.

In October 1990, a jury found appellant guilty of possession of a controlled substance; the district court sentenced him to six years' confinement, probated, and a $3000 fine. Appellant failed to timely perfect an appeal from this conviction. Subsequently, appellant filed in the district court his application for a writ of habeas corpus, in which he argued that he was denied effective assistance of counsel at trial and requested a new trial. After issuing the writ and conducting a hearing, the district court denied appellant's requested relief for a new trial and, instead, granted appellant an out-of-time appeal. Feeling that an out-of-time appeal would not allow him to develop the record he needs to prove his ineffective-assistance-of-counsel claim, appellant appeals from this order. We will affirm the order.

DISCUSSION

In a single point of error, appellant complains that he should be granted a new trial because he received ineffective assistance of counsel at trial. Appellant asserts that his trial counsel made two related errors that constitute ineffective

assistance. First, his counsel did not object when the prosecution elicited testimony regarding appellant's refusal to allow the police to search his bags for drugs. Second, his counsel did not object to the prosecutor's jury argument that asked the jury to consider appellant's refusal to consent to a search as evidence of knowledge of possession of a controlled substance. Appellant contends that his trial counsel's ignorance of the law regarding the use of a defendant's refusal to consent as evidence of guilt led to these errors and constitutes ineffective assistance of counsel.

Initially we note that appellant has the burden to prove that counsel's assistance was ineffective. *Moore v. State*, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985). An ineffective-assistance claim is evaluated under the well-established two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires appellant to demonstrate (1) that counsel's representation was deficient, in that counsel made such serious errors that counsel was not functioning effectively as the counsel constitutionally guaranteed to a criminal defendant; and (2) that the deficient performance prejudiced the defense such that appellant was deprived of a fair trial. *Id.* at 687; *see also Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting *Strickland* test).

The State contends that the appropriate standard for appellate review of the district court's determination of this ineffective-assistance claim is a "clearly erroneous" standard. We disagree. A district court's underlying *factual* findings are reviewed based on such a standard. *Sterling v. State*, 681 S.W.2d 680, 683 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd). On the ultimate issue of whether the representation accorded appellant by counsel passes constitutional muster, however, we must make an independent determination, because the inquiry under both the deficiency and prejudice prongs of the *Strickland* test constitute mixed questions of fact and law. *Martin v. McCotter*, 796 F.2d 813, 817 (5th Cir. 1986), *cert. denied*, 479 U.S. 1057 (1987); *Ricalday v. Procunier*, 736 F.2d 203, 206

(5th Cir. 1984); *Vela v. Estelle*, 708 F.2d 954, 961 (5th Cir. 1983), *cert. denied*, 464 U.S. 1053 (1984).

Under the first prong, the defendant must show that counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms. *McFarland v. State*, 845 S.W.2d 824, 842 (Tex. Crim. App. 1992). Under the standard, "a criminal defense lawyer must have a firm command of the facts as well as governing law." *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). The *Strickland* standard, however, "has never been interpreted to mean that the accused is entitled to perfect or errorless counsel." *McFarland*, 845 S.W.2d at 843. Appellant bears a heavy burden to prove his ineffective-assistance claim. Counsel is strongly presumed to have provided adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 690. We must not look at the errors of counsel in a vacuum. As a general rule, isolated instances in the record reflecting errors of omission or commission do not necessarily render counsel's representation ineffective. *McFarland*, 845 S.W.2d at 843. Rather, counsel's performance is to be judged by the "totality of representation" provided. *Id.*; *Strickland*, 466 U.S. at 690.

Judging counsel's performance in the present case based on this standard, it appears that although counsel failed to object to testimony and argument regarding appellant's refusal to consent, counsel performed adequately in all other aspects of representation. The record reflects that appellant's trial counsel attempted to suppress evidence of the methamphetamine and succeeded in suppressing testimony regarding statements made by appellant after he was in police custody; trial counsel repeatedly objected to other evidence presented by the State; and trial counsel presented rebuttal evidence to the State's claim that appellant had knowledge of possession of a controlled substance.

We will assume for purposes of this discussion that

counsel's failure to object to testimony and jury argument regarding appellant's refusal to consent to a search in the present case constitutes a mistake.[1] Whether counsel's failure to object under these circumstances constitutes a mistake does not, however, resolve the issue before us. Rather, we must decide whether this single error rises to the level of deficient performance, i.e., whether such conduct falls outside the range of professionally competent assistance in defending appellant.

Although counsel's performance must be judged on a "totality of representation" standard, we note that in some circumstances a single error may be sufficient to establish deficient performance under the first prong of the *Strickland* test. *See McFarland*, 845 S.W.2d at 844; *Ex parte Zepeda*, 819 S.W.2d 874 (Tex. Crim. App. 1991). In both *McFarland* and *Zepeda*, however, counsel failed to assert their clients' rights on basic and fundamental issues that were well settled under Texas law. *See McFarland*, 845 S.W.2d at 844 (counsel's single error in failing to object to jury argument involving impermissible comment on appellant's post-arrest silence or his subsequent failure to testify was sufficient to meet first prong of *Strickland* test); *Zepeda*, 819 S.W.2d at 876-77 (where only testimony linking defendant with murder was testimony of accomplice witnesses, counsel's single error in failing to request instruction informing jury that additional corroborating evidence tending to link defendant to murder was necessary to convict rendered counsel's performance deficient under first prong of *Strickland* test).

The circumstances of the present case are distinguishable. That a defendant's refusal to consent to search may not be used as evidence of guilt, however logical it may seem in hindsight, is not a proposition that can be considered well established in state or federal law; nor is it so

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[1]The state conceded in its brief to this Court that it "does not contend that comment at trial on a person's exercise of constitutional rights is a recommended procedure for prosecutors."

basic and fundamental a proposition as to compel the conclusion that any counsel who fails to perceive it is "not functioning effectively as the counsel constitutionally guaranteed to a criminal defendant." With regard to state law, appellant points us to only one Texas court of appeals case that stands for this proposition, *Powell v. State*, 660 S.W. 2d 842, 845 (Tex. App.—El Paso 1983, no pet.) ("[t]he invocation of constitutional rights such as assistance of counsel, silence, or freedom from unreasonable searches and seizures may not be relied upon as evidence of guilt"). While we tend to agree with the general rule stated in *Powell*, we do not believe that a rule of law articulated in one lower appellate-court case may definitively establish the standard for the knowledge that a Texas attorney operating under prevailing professional norms must possess. The only other cases to which appellant directs us are from other jurisdictions. *See Commonwealth v. Welch*, 585 A.2d 517 (Pa. Super. Ct. 1991); *Garcia v. State*, 712 P.2d 1375 (N.M. 1986); *Gomez v. State*, 572 So.2d 952 (Fla. Dist. Ct. App. 1990). Although these cases may provide persuasive authority that Texas should adopt a similar rule, such case law certainly does not establish that any Texas attorney who fails to assert this rule is operating below prevailing professional norms.

Appellant directs us to no federal law indicating that a defendant's refusal to consent may not be used as evidence of guilt. Our research has revealed only two cases directly on point. *See United States v. Prescott*, 581 F.2d 1343, 1350-51 (9th Cir. 1978); *Anable v. Ford*, 653 F.Supp. 22, 36 (W.D. Ark. 1985). Neither *Anable* or *Prescott* has been cited in subsequent cases for the proposition at issue in this case. Again, we do not believe that a handful of cases from other jurisdictions establish the standard for knowledge that a Texas attorney operating under prevailing professional norms must possess.

We further note that even in the jurisdictions indicating that this general rule has been adopted, the circumstances in which such a rule should be applied are still

developing. Although appellant contends that this general rule is simple, arguing that a defendant's refusal to consent may never be used as evidence of guilt, the case law does not necessarily support this broad assertion. For example, in *Anable*, the court stated that "a refusal to consent to a search cannot lead to an inference of guilt *unless the search is initially authorized by the Fourth Amendment.*" 635 F.Supp. at 36 (emphasis added). Further, in *Gomez* the court indicated that the defendant's refusal to consent could not lead to an inference of guilt *because there was no probable cause to search at the time defendant refused consent.*" 572 So.2d at 953.[2]

In addition to the case-law exceptions identified above, the State in the present case points out another exception that may be applicable to the general rule: the issue of custody. The State contends that the rule articulated in *Powell* was applied where the defendant refused consent *while in custody*, whereas appellant in this case was not in custody at the time consent was refused. Accordingly, the general rule articulated in *Powell* may not be as broad as appellant contends.

Based on our research of the general rule that a defendant's refusal to consent may not be used as evidence of guilt, we conclude that this rule of law and the circumstances in which it applies is still a developing area of the law. Because of the relative dearth of case law on this point, we cannot conclude that a Texas attorney operating under prevailing professional norms must have appreciated

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[2]We note that a positive "alert" by a dog properly trained to sniff for drugs can provide probable cause for arrest. *See Florida v. Royer*, 460 U.S. 491, 506 (1983); *Walsh v. State*, 743 S.W.2d 687, 689 (Tex. App.—Houston [1st Dist.] 1987, no pet.). Thus, the possibility that the "exception" recognized by *Anable* and *Gomez* will be adopted in Texas provides additional grounds for our conclusion that the failure of appellant's trial counsel to object to evidence of refusal to consent does not amount to an "error" constituting defective representation.

this general rule in order to have provided effective assistance. In other words, we conclude that this general rule, even if it ultimately proves to be a correct statement of the law, is not yet such a basic, fundamental, and well-established rule under Texas or federal law that a single error establishes ineffective assistance of counsel. Although it may have been more prudent for appellant's trial counsel to have asserted the right under these circumstances, we cannot say that failing to assert it in the two instances complained of here constitutes deficient performance under the first prong of the *Strickland* test.

Because we conclude that appellant did not meet his burden with respect to the first prong of the *Strickland* test, we need not address the second prong of the test, and we overrule appellant's single point of error.

CONCLUSION

The order of the district court is affirmed.

J. Woodfin Jones, Justice

[Before Chief Justice Carroll, Justices Aboussie and Jones]

Affirmed

Filed: August 25, 1993

[Publish]

APPENDIX B

No. 1186-93

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

EX PARTE
LEX DALE OWENS

October 20, 1993

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

JUDGE MALONEY NOT PARTICIPATING

Thomas Lowe, Clerk